

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant :	Chinn et al.	Art Unit :	2625
Patent No. :	7,408,673	Examiner :	Charlotte M. Baker
Issue Date :	August 5, 2008	Conf. No. :	1127
Serial No. :	10/646,993		
Filed :	August 21, 2003		
Title :	MIXED COLOR GROUPS		

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

APPLICATION FOR PATENT TERM ADJUSTMENT UNDER 37 CFR 1.705(d)

Applicants hereby petition for reconsideration of the Patent Term Adjustment (PTA) accorded the above-referenced patent application. The Issue Notification mailed July 16, 2008 for the above-referenced application indicates that the Patent Term Adjustment at issuance is 987 days. Reconsideration of the Patent Term Adjustment calculation to increase PTO Delay from 987 days to 1384 days, and to increase Total PTA from 987 to 1384 days, is respectfully requested.

REVIEW OF PATENT TERM ADJUSTMENT CALCULATION

A review of the Patent Term Adjustment History in the PAIR system shows that the United States Patent and Trademark Office (PTO) calculated the Patent Term Adjustment (PTA) as follows:

- 1) The PTO mailed a delayed 14-month first non-final Office Action on July 5, 2007, thereby according a PTO Delay of 987 days. Applicants do not dispute herein this patent term adjustment calculation for this PTO "A Delay."
- 2) The application was filed on August 21, 2003 and the patent issued on August 5, 2008, more than three years later. No PTO Delay was calculated for issuance of the patent after three years from filing. Applicants respectfully submit that the PTO's calculation of this PTO "B Delay" contains an error and that the correct PTO Delay for issuance beyond three years from filing is 397 days, as outlined further below. The PTO Delay of 987 days ("A Delay") includes 318 days after

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I hereby certify that this paper was filed with the United States Patent and Trademark Office using the EFS -WEB system on this date: December 22, 2008

three years from filing where “A” and “B” delays overlap. Therefore, the “B Delay” of 397 days does not include the overlapping 318 days.

REMARKS

Applicants have calculated the PTA in accordance with the clear intent of Congress. As outlined in *Wyeth v. Dudas* (*Wyeth et al. v. Jon W. Dudas*, U.S. District Court, D.C., CA No. 07-1492, Mem. Op. September 30, 2008), the only way that periods of time can “overlap” is if they occur on the same day, and if an “A delay” occurs on one calendar day and a “B delay” occurs on another, they do not overlap, and 35 U.S.C. § 154(b)(2)(A) does not limit the extension to one day. “A Delays” are defined as delays by the Office under 35 U.S.C. 154(b)(1)(A), which guarantees prompt PTO response. “B Delays” are defined as delays by the Office under 35 U.S.C. § 154(b)(1)(B), which guarantees no more than 3-year application pendency.

The PTA for the instant patent, as currently calculated and shown on the face of the patent, relies on the premise that the application was delayed under § 154(b)(1)(B) before the initial three-year period expired.

The *Wyeth* court determined that this construction cannot be squared with the language of § 154(b)(1)(B), which applies “if the issue of an original patent is delayed due to the failure of the United States Patent and Trademark Office to issue a patent within 3 years,” and that “B delay” begins once the PTO has failed to issue a patent within three years, not before.

In the current PTA calculation, the Office has only given credit for the larger of “A Delay” or “B Delay,” rather than the combined sum of “A Delay” and “B Delay” (which does not include any days after three years from filing where “A” and “B” delays overlap).

In this patent, “A Delay” should be calculated as 987 days, and “B Delay” should be calculated as 397 days. Thus, the total PTO Delay should be calculated as 1384 days.

In consideration of the events described above, Applicants believe the PTA calculation of 987 days is incorrect. As such, Applicants respectfully request reconsideration of the patent term adjustment in the following manner:

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- 1) Total PTO Delay should be calculated as 1384 days;
- 2) Total Applicant Delay should be calculated as 0 days; and
- 3) Total PTA should be calculated as 1384 days.

Applicants note that this patent is not subject to a terminal disclaimer.

Please apply the fee of \$200 required under 37 C.F.R. § 1.18(e) and any other required charges or credits to Deposit Account No. 06-1050.

Respectfully submitted,

Date: December 22, 2008

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